Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20544

In the Matter of Petition for Declaratory Ruling in Response to Primary Jurisdiction Referral, *Autauga County Emergency Management Communication District et al. v. BellSouth Telecommunications, LLC*, No. 2:15-cv-00765-SGC (N.D. Ala.)	WC Docket No. 19-44

REPLY COMMENTS OF THE 911 DISTRICTS FOR AUTAUGA COUNTY, CALHOUN COUNTY, MOBILE COUNTY, AND THE CITY OF BIRMINGHAM IN ALABAMA

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SUMMARY

The 911 districts for Autauga County, Calhoun County, Mobile County, and the City of Birmingham in Alabama (the "Districts") submit these reply comments in the above referenced declaratory proceeding related to the District Court's primary jurisdiction referral in *Autauga County Emergency Management Communication District et al. v. BellSouth Telecommunications, LLC*, No. 2:15-cv-00765-SGC (N.D. Ala.).[1]

The commenters that support BellSouth's petition (the "Telecom Commenters") ask the Commission to fundamentally alter its definition of interconnected-VoIP and to issue a sweeping preemption ruling that ignores the traditional power of states to levy taxes and fees and to guarantee public safety. If granted, the impact of such declarations would be extraordinary. First, the Commission and the telecommunication industry would have to adapt to an entirely new set of

[1] As directed by the Commission, the Districts have filed their own petition for declaratory ruling in this proceeding. Throughout this pleading the Districts rely upon and incorporate the joint statements of facts and issues agreed upon by both the Districts and BellSouth in their respective petitions.

standards for determining whether service constitutes interconnected-VoIP ("IVoIP") or traditional telecommunications. Second, carriers would have virtually absolute discretion to categorize IP voice services as either IVoIP or TDM (or something else). Third, numerous state 911 funding statutes that impose 911 fees on active telephone numbers assigned to VoIP customers would suddenly be invalid, leaving 911 emergency services without a major funding source in many states.

ARGUMENT

I. THE TELECOM COMMENTERS ADVOCATE FOR DRASTIC CHANGES TO THE LAW DEFINING IVOIP AND ITS ATTRIBUTES.

Although they attempt to disguise their arguments as seeking clarification of existing statutes and Commission orders, BellSouth and the Telecom Commenters actually seek a dramatic shift in the way the Commission defines IVoIP.[2]

A. The "Customer Order" Test is Flawed.

Without admitting it, BellSouth, AT&T, Verizon and Windstream all push for a wholesale change in the way IVoIP is defined. Under their new approach, no service would qualify as IVoIP unless the customer's order specifically and expressly requires that the voice be delivered in IP.[3]

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[2] AT&T also argues at length that the 911 Districts have taken inconsistent positions on whether voice must be transmitted in IP over the last mile in order for a service to qualify as IVoIP. To the extent there has been any misunderstanding about the 911 Districts' position, that confusion was caused by Alabama's 911 funding statute which refers to "VoIP or similar technology," a phrase much broader than IVoIP. *See* Ala. Code § 11-98-5.1(c). In any event, the 911 Districts' Comment filed on March 28 should resolve any ambiguity concerning its position. The Districts agree with BellSouth and AT&T that IVoIP requires voice to be transmitted in IP over the last mile. However, the Districts also assert that voice transmitted from the service provider to the customer's premises over Ethernet in packets is a "similar technology" to VoIP. *See* Comments of the 911 Districts filed 3/28/19 at 3-5. The Districts also maintain that this is a question of Alabama law that is for the Alabama federal district court to decide.

[3] *See* AT&T Comments at 7–8; Verizon Comments at 2–4; and Windstream Comments 13-14.

The Telecom Commenters argue that the "requires IP-compatible customer premises equipment" prong of the Rule 9.3 definition of IVoIP can only be satisfied if the customer's order states that the voice be delivered in IP. Stated differently, if the customer order does not specify voice in IP, then the service would not be IVoIP because IP-CPE would not be required (even if the voice is delivered in IP over the last mile and cannot function without IP-CPE).[4] The "customer order" test would, therefore, override the existing definition of IVoIP and the actual reality of how the service is transmitted to the IP-compatible equipment on the customer's premises.

The Telecom Commenters do not, and cannot, cite anything in the text or the history of the definition of IVoIP in Rule 9.3 that supports their "customer order" test. Furthermore, adopting the customer order test would give carriers *carte blanche* discretion over how to categorize their services by wordsmithing customer orders. They could simply draft their contracts so as to not specify that the voice be delivered in IP, while fully intending to deliver a VoIP service. A customer order test could also make it impossible for third-parties to independently determine whether a carrier is a VoIP provider or local exchange provider. In the context of 911 funding statutes and enforcement, states and local authorities would be completely at the mercy of a service provider's self-categorization.

This scenario is not a mere hypothetical. Since at least 2010, AT&T has offered a service that delivers business VoIP over a Managed Internet Service (MIS) into the customer's premises. The service provides various concurrent call capacities and other capabilities depending on

[4] Because the other three prongs of the IVoIP definition are not at issue here, the 911 Districts assume that the service enables real-time, two-way voice communications, requires a broadband connection from the user's location, and permits users generally to receive calls that originate on the public switched telephone network and to terminate calls to the public switched telephone network requires a broadband connection. *See* 47 C.F.R. § 9.3.

whether the customer combines the IP MIS with a TDM PBX (different protocols are offered) or an IP PBX.[5] While AT&T describes this service as BVoIP in the marketing document, it nevertheless refers to the IP MIS connection supporting it as both a PRI and a T-1, which illustrates how easy it is to confuse the nature of the service in a customer-facing document.

B. When IP Voice is Delivered Over the Last Mile, Whether a Customer "Receives" the IP Voice Depends on Many Factors.

BellSouth, AT&T, Verizon and Windstream all contemplate scenarios where they deliver voice in IP over the last mile into the customer's premises where it is converted to TDM just before being received by the customer. They contend that such a service must be considered TDM because the customer never actually receives the voice in IP.[6] If the voice service is handed-off to the customer in TDM, the Telecom Commenters claim that it must be TDM service, not IVoIP. In practice, however, when and where the "hand-off" to the customer occurs and what the customer "receives" is not usually so clear.[7]

Consider a service where the voice is delivered in IP over the last mile to the customer's premises. Inside the customer's premises is IP-compatible equipment that converts the voice from IP to TDM before it reaches a traditional PBX, which then connects to telephone handsets. The

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[5] *See* AT&T, *Class of Service Data Collection Document For AT&T Managed Internet Service (MIS)*, http://carecentral.att.com/downloads/Class_of_Service.pdf.

[6] *See* AT&T Comments at 8; Verizon Comments at 2–4; and Windstream Comments at 13–14. In truth, however, customers utilizing a TDM PBX where the provider delivers the signal in IP over the last mile often receive more flexibility and higher concurrent call capacities (as many as 46 or even 48 concurrent calls) than users whose service is delivered in ISDN PRI/TDM over the last mile, which would be physically limited to 23 concurrent calls. *See* http://carecentral.att.com/downloads/Class_of_Service.pdf.

[7] This fact is evidenced by the disparate comments by the parties and the commenters on the definition of CPE and the relevance of the demarcation point.

Telecom Commenters argue that the customer receives VoIP only if the IP-compatible equipment constitutes CPE. They further claim that, in order for the IP-compatible equipment to be CPE, it must be "end-user equipment."[8] However, they make no real effort to clarify what they believe constitutes "end-user equipment."

It would appear that the Telecom Commenters are suggesting that IP equipment only qualifies as "end-user equipment" and, thus, IP-CPE under Rule 9.3 under one of two circumstances: (1) the IP equipment must directly interface directly with the person making phone calls (such as an IP telephone or PC) or (2) the IP equipment must be owned by the customer.

However, "end-user equipment"/IP-CPE is not limited to customer-facing equipment because the Commission specifically identified "terminal adapters, which contain an IP digital signal processing unit that performs digital-to-audio and audio-to-digital conversion and have a standard telephone jack connection for connecting to a conventional analog telephone" in its *E911 IP Enabled Order.*[9] Because such terminal adapters are obviously not equipment that directly interfaces with the person making the telephone calls, it would appear that the Telecom Commenters are suggesting that "end-user equipment" is limited to IP equipment owned by the customer, not the service provider.[10] If that is, indeed, the argument, then ownership of IP-compatible equipment would determine whether the service qualifies as IVoIP. If the carrier owns

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[8] *See, e.g.,* AT&T Comment at 11–12 (relying on footnote 77 of the *E911 IP Enabled Order* for the "end-user" language).

[9] First Report and Order and Notice of Proposed Rulemaking, *In the Matter of E911 Requirements for IP-Enabled Service Providers*, 20 FCC Rcd 10245, ¶ 24 n.77 (2005) ("*E 911 IP Enabled Order*").

[10] Windstream has made this very argument in 911 litigation in Alabama—specifically, that equipment must be owned by the customer to constitute IP-CPE.

the IP to TDM converter box, then the service would be categorized as TDM. If, however, the customer owns the converter box, then the service would be IVoIP. Nothing, however, would have changed in these two scenarios except for "ownership" of the converter box.[11] This cannot be the determinative factor.

1. "Ownership" is not the defining characteristic of CPE.

Determining whether a voice service qualifies as IVoIP based on who owns the IP-compatible equipment inside the customer's premises is wrought with problems. "Ownership" should not be the defining characteristic of IP-CPE under the Rule 9.3 definition. There are far too many variables in the real world to make ownership the litmus for CPE. What if a customer is in a lease-to-own relationship with the provider for the IP equipment used to deliver the service? What if customer's order is silent as to ownership, but the provider charges the customer a monthly maintenance fee for the IP equipment? What if the customer rents the IP equipment, but the provider has a policy of leaving the equipment on the customer's premises after the conclusion of the relationship? What if the customer's order states that the customer "purchases" the IP equipment from the provider, but the provider reserves the right to repossess the equipment if the customer becomes delinquent? What if the provider supplies the IP equipment, but the customer's order refers to it as "CPE?"

The 911 Districts' requested declaration addresses all of these questions by applying the straightforward, statutory definition of CPE. The Communications Act defines CPE as "equipment employed on the premises of a person (other than a carrier) to originate, route, or

[11] The Districts' requested declaration would resolve this issue by making IP-compatible equipment on the customer's premises presumptively on the customer's side of the network.

terminate telecommunications."[12] IP equipment on the customer's premises that converts voice from IP to TDM or vice versa in the routing of telephone calls clearly meets this definition regardless of ownership.[13] The *location* of the equipment on or in the customer's premises, not who has title to it, determines whether it qualifies as CPE.

The Telecom Commenters mischaracterize the 911 Districts' position as relying on the network demarcation rules for determining whether equipment on the customer's premises constitutes CPE.[14] While the 911 Districts acknowledge the Commission's prior reference to the network demarcation point in its description of IP-CPE, the Districts do *not* rely on the network demarcation rules. Instead, their Petition specifically requests that "the Commission issue a declaration finding that all equipment that transmits, processes, or receives IP packets located on or within the customer's premises is *presumptively on the customer's side of the network* and thus qualifies as IP-CPE for purposes of applying the definition of IVoIP in 47 C.F.R. § 9.3."[15] The Districts primarily rely on the statutory definition of CPE for this requested declaration.[16]

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[12] 47 U.S.C. § 153(16).

[13] AT&T argues that the 911 Districts have not offered sufficient evidence to support a presumption that all IP-compatible equipment on the customer's premises is on the customer-side of the network demarcation. *See* AT&T Comments at 10–11. This argument, however, fails to account for the legal (as opposed to factual) basis of the presumption. The Communications Act creates a legal presumption that equipment located on the premises of a customer is CPE. *See* 47 U.S.C. § 153(16) (defining CPE as "equipment employed on the premises of a person (other than a carrier) to originate, route, or terminate telecommunications").

[14] *See* AT&T Comments at 7–12; Verizon Comments at 4–5; Windstream Comments at 13–14.

[15] *See* 911 Districts' Petition at 20–21 (emphasis added).

[16] *Id*. at 16–17.

2. The Communications Act definition of CPE takes precedence.

In its Petition, BellSouth cited to the Communications Act's definition of CPE with favor.[17] However, BellSouth's affiliate, AT&T Services (represented by BellSouth's counsel), disavows the statutory definition.[18] The Telecom Commenters now argue that the "IP-compatible CPE" referred to in Rule 9.3 does not incorporate the statutory definition of CPE. Instead, as discussed above, they effectively contend that the equipment must be owned by the end-user to constitute CPE, and they cite footnote 77 of the Commission's *E911 IP Enabled Order* for support.[19] There, the Commission stated:

> The term 'IP-compatible CPE' refers to end-user equipment that processes, receives, or transmits IP packets…. For example, IP-compatible CPE includes, but is not limited to, (1) terminal adapters, which contain an IP digital signal processing unit that performs digital-to-audio and audio-to-digital conversion and have a standard telephone jack connection for connecting to a conventional analog telephone; (2) a native IP telephone; or (3) a personal computer with a microphone and speakers, and software to perform the conversion (softphone).[20]

The Commission, in this footnote, was explaining a relatively new concept in 2005, "IP-compatible," which was being appended to the already-defined term, "CPE." The use of the phrase "end-user equipment" in the footnote did not inject an ownership component into the existing

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[17] *See* Bellsouth Petition at 17.

[18] *See* AT&T Comments at 11. Verizon also renounces the statutory definition of CPE. *See* Verizon Comments at 4.

[19] *See* AT&T Comments at 11-12. *See also* Windstream Comments at 14.

[20] First Report and Order and Notice of Proposed Rulemaking, *In the Matter of E911 Requirements for IP-Enabled Service Providers*, 20 FCC Rcd 10245, ¶ 24 n.77 (2005) ("*E 911 IP Enabled Order*").

definition of CPE. Instead, the phrase is consistent with the statutory definition's focus on the *location* of the equipment being at the "the premises of a person (other than a carrier)."[21]

The Telecom Commenters' argument that the Communications Act's definition of CPE has no relevance to IVoIP has other flaws.[22] First, 47 U.S.C. § 152 states that "[t]he provisions of this chapter shall apply to all interstate and foreign communication by wire…."[23] IVoIP undoubtedly involves interstate communication by wire. Second, Section 153 defines not just "customer premises equipment" but also "interconnected VoIP service," "advanced communications service," "information service," "telecommunications," and "telecommunications service," among other terms.[24] The statute does not even suggest that the term "customer premises equipment" would have an altogether different meaning when used in connection with IVoIP, which is defined in the same statute.

Because of the clear statutory directive, the 911 Districts urge the Commission to confirm what should already be obvious—that "Internet protocol-compatible customer premises equipment," as used in Rule 9.3, includes all IP-compatible "equipment employed on the premises of a person (other than a carrier)" regardless of ownership, lease-hold interests, maintenance

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[21] *See* 47 U.S.C. § 153(16).

[22] *See* Verizon Comment at 4 (arguing that the Districts "graft the common-carrier based definitions of CPE…onto the Part 9 definition") and AT&T Comment at 11–12 (arguing that the Districts "focus[] on the wrong equipment").

[23] 47 U.S.C § 152(a).

[24] 47 U.S.C. § 153.

agreements, or other factors that may impact title or possessory rights.[25] Doing so will largely resolve the disagreement here and will make clear that voice delivered in IP over the last mile to the customer's premises constitutes IVoIP.[26]

C. The Commission Should Reaffirm Existing Pronouncements about IVoIP.

The Telecom Commenters' position on IVoIP conflicts with the Commission's descriptions of "local exchange telephone service" and "interconnected VoIP service" in its Form 477 Instructions.[27] Those instructions clearly focus on how the voice is being transmitted over the last mile from the telecommunications network to the customer's premises. They state that "local exchange telephone service uses analog or Time Division Multiplexing (TDM) to transmit voice calls between the end-user customer's device and the public switched telephone network" whereas IVoIP service "uses IP packet format to transmit voice calls between the end-user customer's specialized equipment (such as an IP telephone, IP PBX, or TDM-to-IP converter device that is attached to an ordinary telephone or conventional PBX) and the telecommunications network."[28]

BellSouth and the Telecom Commenters urge the Commission to adopt a position completely at odds with these instructions. In particular, they argue that a service which transmits voice in IP over the last mile is ***not*** IVoIP if the provider utilizes IP equipment *inside* the customer's premises to convert the voice to TDM before connecting it to the customer's legacy phone system.

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[25] The Commission's declaration could also specify certain types of equipment on the customer's premises that, in the Commission's view, would not constitute IP-CPE under Rule 9.3. Such specification would address the concerns raised by AT&T at page 12 of its Comment.

[26] This is so because voice in IP necessarily "requires" IP equipment in order to convert the packets to a form that can be heard and understood by the user, thus satisfying the "requires" IP-CPE prong of the 9.3 definition.

[27] *See* https://transition.fcc.gov/form477/477inst.pdf at p. 35-36.

[28] *Id*.

If this position were correct, services such as Vonage and MagicJack would no longer be considered VoIP. Those services convert IP packets into analog voice with the use of a simple "dongle" or ATA.

Instead of adopting this head-scratching position, the Commission should reaffirm its existing, straightforward approach to IVoIP. When the provider transmits voice in IP over the last mile into the customer's premises where it terminates into IP-compatible equipment, then the service constitutes IVoIP. The statutory definition of CPE applies. Because the IP-compatible equipment is "located on the premises of the customer (other than a carrier)," it qualifies as IP-CPE. And because the voice is delivered in IP packets over the last mile, the service "requires" the IP-CPE in order to function. Plain and simple.

II. THE COMMISSION SHOULD NOT ADDRESS PREEMPTION. HOWEVER, IF IT DOES, THE COMMISSION WILL FIND THAT SECTION 615A-1'S PREEMPTIVE EFFECT IS NARROWLY APPLICABLE TO THE RATE OF 911 FEES.

The Commission does not have to address the scope of Section 615a-1's preemptive language. Although the district court did not specifically reserve the issue of preemption for itself, it did not address any of the necessary factors for a primary jurisdiction referral in the context of the preemption question. Rather, the district court's analysis focused on the VoIP question at issue. As a result, the Districts contend that the preemption question is not before the Commission by means of a primary jurisdiction referral.

Further, to the extent that the Commission can decide preemption, it should choose not to. The district court has the necessary judicial expertise to evaluate preemption and statutory interpretation; whereas, the Commission has no particular expertise in this area. Further, contrary

to some commenters—Windstream in particular—the district court would not owe *Chevron* deference to a Commission determination on preemption.[29]

A. The Plain Meaning of Section 615a-1 Provides that the Rate of 911 Fees on VoIP Cannot be Higher Than the Rate on Traditional Service.

BellSouth and the various Telecom Commenters urging the Commission to find that 47 U.S.C. § 615a-1 preempts Alabama's Emergency Telephone Service Act, Ala. Code § 11-98-1, *et seq.* ("ETSA"), largely fail to account for the high threshold for finding preemption in this context. The Commission, if it even undertakes a preemption analysis, must start with a presumption *against* preemption.[30] To overcome the presumption against preemption, the Commission must find that Congress expressed its intent to preempt state law with "unmistakably clear . . . language of the statute."[31] Congress's intent must be "clear and manifest" in the statute.[32] The high burden of overcoming the presumption against preemption by demonstrating an *unmistakable* intent is particularly important is the present case where BellSouth is asking the Commission to find preemption of two traditional state powers—the power to impose taxes and fees and the power to guarantee public safety.[33]

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[29] *See Wyeth v. Levine*, 555 U.S. 555, 576–77 (2009).

[30] *See id.* at 565 ("'In all pre-emption cases, and particularly in those in which Congress has 'legislated ... in a field which the States have traditionally occupied,' . . . we 'start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'") (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996)).

[31] *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991).

[32] *Id.*

[33] *Id.* ("Congressional interference with this decision of the people of Missouri, defining their constitutional officers, would upset the usual constitutional balance of federal and state powers. For this reason, 'it is incumbent upon the federal courts to be certain of Congress' intent before

The presumption against preemption applies both to whether a statute preempts state law at all and to the scope of the intended preemption.[34] In other words, even if a statute unmistakably preempts state law, the scope of the preemption must be given a "fair but narrow reading" with the presumption that state law is not preempted.[35] Specifically, in this proceeding, Section 615a-1 provides that "the fee or charge may not exceed the amount of any such fee or charge applicable to the same class of subscribers to telecommunications services."[36] Even assuming, without conceding, that Section 615a-1 is a sufficiently clear statement of Congressional intent to have *some* preemptive effect, the *scope* of the preemption must also be clear and unmistakable—with the presumption against preemption guiding the analysis.

Here, while Section 615a-1 arguably preempts states' ability to impose different 911 fee *rates* on IVoIP service,[37] it does not prescribe, let alone preempt, the method of calculation, or the unit to which 911 fees are applied. BellSouth and the Telecom Commenters' are imposing a gloss on the scope and meaning of Section 615a-1 that is not clearly and unmistakably found in the actual text of the statute. The text of Section 615a-1 specifically refers to the "amount of any such

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finding that federal law overrides' this balance.") (quoting *Atascadero State Hosp. v. Scanlon*,, 473 U.S. 234, 243 (1985)).

[34] *See Meditronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996); *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 523 (1992).

[35] *Cipollone*, 505 U.S. at 524.

[36] 47 U.S.C. § 615a-1.

[37] Importantly, Section 615a-1's restriction on 911 fees is limited to "IP-enabled services," which only includes interconnected VoIP. *See* 47 U.S.C. § 227(8)(c); 47 C.F.R. § 9.3. As a result, any suggestion by a Commenter—*see* CenturyLink Comment at 5—that Section 615a-1 limits a state's ability to impose 911 fees on services that are not IP-enabled services is plainly not supported by the text of the statute.

fee or *charge*."[38] Notably, "fee" and "charge" are singular, not plural, so the text of the statute refers to a single fee or a single charge.[39] The text of the statute does not mention "total amount imposed," "billed amount," "total fees," "total charges," or any other language that means the total amount billed to a customer.[40] Nor does Section 615a-1 refer to the dependent variable of the calculation of a total amount billed and remitted—the number of units (line, telephone number, etc.).

Alabama's ETSA provides an example of the singular usage of the terms "fee" and "charge." The ETSA states:

> The board of commissioners of the district may, when so authorized by a vote of a majority of the persons voting within the district, in accordance with law, levy an emergency telephone service ***charge*** in an amount not to exceed five percent of the maximum tariff rate charged by any service supplier in the district, except that in counties with populations of less than 25,000 as determined by the most recent population census, the board of commissioners may, when so authorized by a vote of a majority of the persons voting within the district, in accordance with law, levy an emergency telephone service ***charge*** in an amount not to exceed two dollars ($2).
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> . . .
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> The emergency communication district **fee** authorized and levied in each district pursuant to Section 11-98-5 shall apply to all wired telephone service utilized within the district, including such service provided through Voice-Over-Internet Protocol (VoIP) or other similar technology. It shall be the duty of each provider of

[38] 47 U.S.C. § 615a-1 (emphasis added).

[39] "Fee" is defined as "a fixed charge." *Fee*, Merriam-Webster, https://www.merriam-webster.com/dictionary/fee. "Charge" is defined as "expense, cost." *Charge*, Merriam-Webster, https://www.merriam-webster.com/dictionary/charge.

[40] BellSouth's focus on the word "amount" is not equivalent to "total amount of all fees assessed on a customer." In addition to the definition quoted by BellSouth, "amount" is also defined by Merriam-Webster as "the quantity at hand or under consideration." *Amount*, Merriam-Webster, https://www.merriam-webster.com/dictionary/amount. This definition fits the Districts' interpretation, as Section 615a-1 discusses the quantity of a single fee/charge.

> VoIP or similar service to collect the **fee** for each 10-digit access number assigned to the user and to remit such fee as provided in Section 11-98-5.[41]

The usage of terms "charge" and "fee" in the ETSA indicates that it is singular—a "charge" or "fee" is the base amount charged per one unit of telephone service. For example, a "fee" is imposed on "*each* 10-digit access number," and "the board of commissioners may . . . levy . . . an emergency telephone service charge in an amount not to exceed two dollars."[42]

Likewise, Florida's Emergency Communications Number E911 Act states: "Any new allocation percentages or reduced or increased ***fee*** may not be adjusted for 1 year. In no event shall the ***fee*** exceed 50 cents per month for each service identifier. The ***fee***, and any board adjustment of the ***fee***, shall be uniform throughout the state, except for the counties identified in paragraph (f)."[43] These two examples demonstrate that the plain, ordinary meanings of the words "fee" and "charge" are—or at least can be—a single fee or a single charge. Specifically, in the context of emergency communications, "fee" and "charge" refers to a single fee or charge applied to a single unit of telephone service.

Beyond state law, the Commission's own report to Congress is consistent with this plain meaning reading of "fee," "charge," and "amount."[44] In its Tenth Annual Report to Congress on State Collection and Distribution of 911 and Enhanced 911 Fees and Charges, the Commission reported "the amount of fees or charges imposed for the implementation and support of 911 and

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[41] Ala. Code §§ 11-98-5, -5.1 (emphasis added).

[42] *Id.*

[43] Fla. Stat. § 365.172(8)(h).

[44] *See S.D. Warren Co. v. Maine Bd. of Environmental Protection*, 547 U.S. 370, 377 (2006) (relying on agency usage of a word for its plain meaning).

E911 services."[45] In particular, the Commission reported "the average fee by type of service," and the average fee reflected in the Report was the *rate*, not a total billed amount.[46] In Appendix C of the Report, the Commission listed the "fee" for each reporting state; the "fee" was the rate, not the total amount billed and remitted by a customer.[47] This usage of the term "fee" demonstrates—consistent with the plain meaning of Section 615a-1 and state usage—that "fee" or "charge" means a singular fee or charge.

In short, the plain meaning of Section 615a-1 is that a single 911 fee or charge for VoIP may not exceed a single fee or charge for traditional service. This is an appropriately narrow reading of the preemptive effect of Section 615a-1 that is guided by the presumption against preemption. BellSouth's interpretation is far too broad and largely ignores the presumption against preemption. The Commission should therefore reject BellSouth's interpretation and refuse to grants its petition on this point. Moreover, the Commission need not address the various policy arguments raised by BellSouth and the Telecom Commenters because preemption in this context can only be found when the text of the statute clearly and unmistakably preempts state law.

B. The House Report on the NET 911 Act Specifically Addresses the *Rate* of 911 Fees.

Although the Commission cannot look beyond the text of the statute, the legislative history of Section 615a-1 supports the Districts' interpretation. BellSouth and other commenters have argued that the Districts, in their Petition, impermissibly used a report by the Congressional Budget

[45] Federal Communications Commission, Tenth Annual Report to Congress On State Collection and Distribution of 911 and Enhanced 911 Fees and Charges (2018), 30 *available at* https://www.fcc.gov/files/10thannual911feereporttocongresspdf. [*hereinafter* Commission's 10th Annual Report]

[46] *Id.* at 31.

[47] *Id.* at Appx. C

Office as evidence of Congressional intent. Regardless of whether the CBO report incorporated into the House Report regarding the NET 911 Act is properly considered as legislative history, the House Report provides an even clearer statement relating to the phrase "amount of such fee or charge:"

> New subsection 6(f) would provide that nothing in H.R. 3403, the Communications Act of 1934, or any Commission regulation or order prevents States or their political subdivisions from imposing or collecting 911 or E–911 fees, so long as those fees are obligated or spent in support of 911 or E–911 services and do not exceed fees imposed or collected from other telecommunications service providers for specific classes of customers. *For example, if a State or its political subdivision imposes a 911 fee on wireless or wireline carriers that consists of* ***one rate*** *for residential customers and another rate for business customers, the State or its political subdivision may collect no more from VoIP providers for the same classes of customers.*[48]

This quote is from the Committee Report's "Section-by-Section Analysis of the Legislation." In other words, the Committee's own explanation of Section 615a-1 is focused on the *rate*, not the total number of fees. This statement in the Committee Report is hardly the clear and unmistakable intent needed to support BellSouth's position. Verizon puzzlingly quoted this section of the House Report in support of its and BellSouth's position.[49] The House Report clearly discusses rate, not the total amount collected, and Verizon's reading of this sentence from the legislative history completely ignores the mention of the word "rate."

[48] H.R. Rep. No. 110-442 at 15 (2007) (emphasis added). (emphasis added).

[49] Verizon Comment at 9–10.

C. The Call Capacity of VoIP is Not Comparable to the Call Capacity of Traditional Service, and as a Result, VoIP Service and Traditional Service Are Not Similarly Situated.

The practical context of imposing 911 fees on different technologies also supports the Districts' interpretation and makes Alabama's establishment of a different basis for assessing 911 fees for VoIP and traditional service reasonable. In particular, traditional service and VoIP service are not necessarily comparable on a unit-to-unit basis. As the Commission noted in its *IP-Enabled* Order, "911 contribution obligations are typically assessed on a per-line basis."[50] In general, VoIP does not have "lines" in the same way as traditional service. Therefore, VoIP does not fit within the typical framework for imposing 911 fees on traditional service. The assumption underlying BellSouth's petition and the other telecom comments that traditional circuit-switched phone service and VoIP service are similarly situated and can be assessed on the same unit basis is false. Because this basic assumption is false, a finding of preemption consistent with BellSouth's petition would create an unworkable standard for states to follow.

Across the various Telecom Commenters, most, if not all, suggest that VoIP and local exchange service should both be assessed 911 fees based on call capacity (or simultaneous call capability), which is facially consistent with the traditional fee-per-line framework.[51] However, the call capacity of VoIP is frequently not fixed at any specific location. Instead, VoIP providers can offer "burstable" levels of simultaneous calls depending on a customer's needs—meaning a customer may contract for a certain number of simultaneous calls but be able to access more call paths than its contract allows. Because of this flexible, customizable VoIP technology, comparing

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[50] *E 911 IP-Enabled Order* at 30 n. 163.

[51] For example, the NCTA states that a traditional line or channel is the functional equivalent of an "activated line or channel" in VoIP. NCTA Comment at 4.

the call capacity of VoIP and local exchange is unavailing. VoIP call capacity versus local exchange call capacity is rarely, if ever, an apples-to-apples comparison. As a result, a finding of preemption that requires VoIP and local exchange to be assessed 911 fees on the same unit basis would not be based in the reality of VoIP capabilities and existing VoIP offerings. In fact, current VoIP offerings from three commenters demonstrate why their call for preemption is not based in reality.

First, Verizon has a VoIP offering with the following capability:

> **Burstable Enterprise Shared Trunks (BEST).** Customer's VoIP sites that are provisioned with BEST will be able to share the total simultaneous calling capacity purchased by Customer across its enterprise on a regional basis. Thus, simultaneous call units within a region contribute to the total available concurrent call capacity only within that region. Concurrent call pools cannot be regionally shared between the U.S./Canada, Europe, and Asia-Pac regions. BEST applies to enterprises in which all locations are on a metered or tiered pricing model. Simultaneous calling capacity can be shared between locations receiving both Local and LD VoIP service, and between locations receiving only LD service, but not across those two kinds of locations.[52]

This BEST option allows for dynamic simultaneous call capacity and prevents an accurate assessment of a specific location's simultaneous call capability. According to this description, a customer with locations in the Birmingham 911 District, the Mobile 911 District, and the Calhoun 911 District could hypothetically have the ability to make 100 simultaneous calls, shared among the three locations. However, because the customer "will be able to share the total simultaneous calling capacity purchased by Customer across its enterprise," each of those locations would be able to make 100 simultaneous calls.[53] This scenario poses two important questions that BellSouth and the Telecom Commenters' desired outcome cannot answer: (1) What is the local exchange

[52] Ex. A, Verizon Voice Over IP Service at ¶ 1.2.2.

[53] *Id.*

equivalent for each location? (2) How many 911 fees does this customer pay to each of the three 911 districts?

Each location has the ability to make 100 simultaneous calls to 911, but a customer with traditional PRI service would need five PRIs at each location (fifteen total PRIs for the customer) to achieve this level of service—providing that customer with the capability to make at least 100 simultaneous calls at each location. This is hardly an apples-to-apples comparison, as the PRI customer would have a minimum total simultaneous call capacity of 300 for its three locations. Further, if the Verizon BEST customer paid each 911 district 100 911 fees, then it would be paying 300 911 fees for service with a total simultaneous call capacity of 100, which is contrary to BellSouth and the Telecom Commenters' desired outcome. However, any amount of 911 fees less than 100 to each district would fail to account for the potential demand placed on each 911 district. Each 911 district would need the capability—and therefore funding—to respond to 100 calls to 911.

CenturyLink also offers an IP voice service with a "burstable" number of call paths:

> ▪ Usage Features include Burstable call Paths used in conjunction with SIP Trunk bursting.[54]

CenturyLink's Comment in this proceeding stands in stark contrast to the customer-facing product literature quoted above. CenturyLink bases its argument on the concept that a "VoIP subscriber and legacy services customer each purchase the same amount of calling capacity."[55] As CenturyLink's own product literature demonstrates, however, a VoIP customer's calling capacity

[54] Ex. B, CenturyLink GSA Proposal at 26.

[55] CenturyLink Comment at 10.

is frequently not static and has the ability to "burst" or increase. Thus, CenturyLink can hardly make a direct comparison between the call capacity of its VoIP customer and a local exchange customer.

Finally, AT&T offers this same ability for its IP Flexible Reach service:[56]

What is Trunk Burst and how does it work?

Bursting and sharing is functionality that allows for calls that go beyond the maximum number allowed on the trunk to borrow call capacity from another group trunk group within your enterprise.

The maximum group trunk group burst can't exceed 20% of a group trunk group's maximum concurrent call limit. Bursting and sharing is initially set to false and is managed by AT&T. If your enterprise wants to utilize or make changes to this functionality, contact your AT&T account representative.

The Trunk Burst setting on a group trunk group indicates whether your Enterprise is using this functionality or not. The setting is either true or false.

For more information, see: About Trunk Burst

Just as with Verizon and CenturyLink, AT&T offers a VoIP service with a variable simultaneous call capacity. An IP Flexible Reach customer may contract for 100 simultaneous calls, yet its service can burst to have many more than that and even share call capacity with other locations.

These three examples demonstrate that "call capacity," which is the equivalence standard used by BellSouth, CenturyLink, Verizon, and the NCTA, is illusory.[57] One of the advantages and selling points of VoIP is its customization, flexibility, and absence of physical limitations inherent in traditional service. These advantages necessarily make equating traditional service to VoIP on some type of unit-to-unit basis difficult, if not impossible. This difficulty was addressed by the Commission in the *IP-Enabled* Order: "Because 911 contribution obligations are typically

[56] Ex. C, AT&T IP Flexible Reach Enterprise Administrator Guide at 42–43.

[57] BellSouth has failed to provide any evidence to the Commission of an actual customer, scenario, or service that would demonstrate equivalence between VoIP and traditional service.

assessed on a per-line basis, states may need to explore other means of collecting an appropriate amount from competitive LECs on behalf of their interconnected VoIP partners, such as a per-subscriber basis."[58] The Commission recognized that a "per-line basis" is not necessarily a fit for VoIP and that states needed to explore other bases—or units—of assessing 911 fees.

Ultimately, to advance their position, BellSouth and the other commenters have created a false paradigm where VoIP's call capacity is always similarly situated to traditional circuit-switched service. That is not the reality.[59] The three burstable services above demonstrate that VoIP and traditional service are frequently not similarly situated. The Commission should not declare that VoIP and traditional service must be assessed 911 fees on the same unit basis. Doing so would ignore the flexibility and customizability that accompanies the technological advantages of VoIP. BellSouth's desired outcome is unworkable, and it would cause widespread confusion among the states that have enacted 911 funding laws that account for the clear differences between VoIP and traditional services.

D. Maintaining the Status Quo Will Not Impede Federal VoIP Policy.

Many Commenters, including BellSouth, argue that the Districts' interpretation of Section 615a-1 would slow the deployment of IP-based technologies and the transition to an all-IP network. This concern is overblown and based on unsupported assumptions. First, BellSouth assumes that an increased number of 911 fees on VoIP service will necessarily cause customers to choose traditional service, but BellSouth assumes that the 911 fees would necessarily make the

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[58] *E 911 IP-Enabled Order* at 30 n.163.

[59] Even if a circumstance exists where a VoIP customer is similarly situated to a traditional service customer, Alabama's ETSA—and other state statutes—has a cap on the total number of 911 fees, so any perceived difference in fees has an ultimate cap. *See* Ala. Code § 11-98-5(c).

customer's total bill for VoIP higher than traditional service. Yet, BellSouth has not provided any evidence that VoIP and traditional service have similar overall costs. In reality, VoIP often provides costs savings compared to traditional service.[60] Second, BellSouth assumes that an increase in 911 fees, which often represent a small portion of a customer's overall bill, are a deciding factor for choosing a voice service—not the fee charged for the service, not a customer's desired capabilities, and not the other options available in a customer's market.

However, beyond these unsupported assumptions, BellSouth and the other Telecom Commenters ignore the current reality of the deployment of IP-based technologies and the transition to an all-IP network. Substantial progress towards these goals has already been made without the preemptive outcome desired by BellSouth. Neither the Commission nor any Court has found that Section 615a-1 preempts any state law, so state laws—like Alabama's ETSA—have been in effect while voice providers have been deploying more IP-based technologies and transitioning to IP-networks.[61] If 911 funding laws were a legitimate discouragement to IP-networks, BellSouth and other telecoms would have attacked these laws much earlier.

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[60] AT&T recently represented to the Commission that "business customers will prefer the benefits of IP-based communications systems, which include **cost savings**, additional features, and flexibility . . . ." Ex. D, Comments of AT&T, Inc., *In the Matter of Public Safety and Homeland Security Bureau Seeks Comment on Multi-Line Telephone Systems Pursuant to the Next Generation 911 Advancement Act of 2012* at iii. Further, the Commission noted in its 2014 *Technology Transitions* Order that transition to IP based phone systems could lead to "lower prices" for customers. *In the Matter of Technology Transitions*, 29 FCC Rcd. 1433 at 1435 (2014).

[61] Notably, Alabama's ETSA has been repealed and replaced with a different scheme for imposing 911 fees. Therefore, a ruling in favor of the Districts on whether Section 615a-1 preempts the ETSA will have little to no prospective effect and will not create any incentive to purchase traditional service instead of VoIP.

BellSouth and the Telecom Commenters know that the transition from traditional service to IP service has been underway for years. In 2012, AT&T reported to the Commission that traditional circuit-switched systems "are fast being replaced by IP-based system."[62] AT&T also predicted in 2012 that "IP-based systems [will] quickly replace" circuit-switched systems and even cautioned against "re-engineering [traditional circuit-switched] systems that are scheduled to be replaced."[63] In other words, approximately seven years ago, AT&T—without the benefit of the preemption ruling it seeks—was reporting a rapid transition to IP technology away from traditional circuit switched systems. As USTelecom notes in its comment, BellSouth, CenturyLink, Frontier, and Windstream have recently committed to deploy broadband to 125,000 locations in Alabama.[64] In addition, the Commission's "Voice Telephone Services: Status as of June 30, 2017" reported a consistent decline in subscriptions to retail switched access lines and a consistent increase in VoIP subscriptions.[65] Will the "quick," "fast" progress, the "scheduled" replacements, the 125,000 planned broadband locations, and the consistent increase in VoIP connections come to a stop because the Commission finds that repealed and currently active 911 laws are not preempted? The answer is decidedly no. The transition to IP phone systems is happening, regardless of whether the Commission maintains the status quo by rejecting BellSouth's requested preemption ruling.

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[62] Ex. D, Comments of AT&T at iii.

[63] *Id.*

[64] USTelecom Comment at 4 n.9.

[65] Industry Analysis and Technology Division – Wireline Competition Bureau, Federal Communications Commission, *Voice Telephone Services: Status as of June 30, 2017* (2018) at 4, *available at* https://www.fcc.gov/voice-telephone-services-report.

E. Maintaining the Status Quo Will Not Increase 911 Fee Diversion.

Several commenters suggest that states will be incentivized to divert 911 funds if the Commission does not make a finding of preemption. As with other arguments by the Telecom Commenters, this argument ignores the current state of law. Neither the Commission nor any Court has found that Section 615a-1 preempts any state law. Rather, states have operated under Section 615a-1 without a preemption ruling since the effective date of the NET 911 Act. Thus, the commenters fearful of 911 fee diversion are arguing that the *status quo* will cause a change in state behavior. The Commission should not accept this absurd argument.

Further, the Commission should not base a preemption decision on the actions of a minority of states. Alabama and the Districts in this case do not divert 911 fees to non-911 purposes. Nevertheless, the notion that non-diverting states will suddenly rush to use 911 as a cash cow for other government spending because of an affirmation of the status quo is absurd. The commenters arguing this straw man position assume that states neither value 911 services nor feel political pressure regarding the rate of 911 fees. However, forty-nine states, districts, and territories value 911 enough under the status quo not to divert 911 fee funds away from 911 emergency services.[66] In addition, states and local 911 entities face political pressure and are accountable to their constituents for the rates and total amounts of 911 fees, so the fears of a wildly inordinate 911 fee burden on VoIP can be ultimately checked in the normal state and local political process and does not need the oversight of a federal agency.

[66] Commission's 10th Annual Report at 3.

CONCLUSION

For the reasons discussed above, the Alabama 911 Districts respectfully request that the Commission reject BellSouth's Petition and, instead, grant the declaratory relief sought by the Districts in their petition.

Respectfully submitted,

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